

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

J. GARY KERNS,)	
)	2:08-cv-02016-GEB-KJM
Plaintiff,)	
)	
v.)	<u>FINDINGS OF FACT AND</u>
)	<u>CONCLUSIONS OF LAW</u>
THE NORTHWESTERN MUTUAL LIFE)	
INSURANCE COMPANY,)	
)	
Defendant.)	
_____)	

A bench trial was held in this breach of contract and declaratory relief action on November 16, 2010. Plaintiff J. Gary Kerns ("Kerns") seeks damages from Defendant Northwestern Mutual Life Insurance Company ("Northwestern") for breach of insurance contracts and a declaration that he is entitled to lifetime benefits under the total disability provisions of his policies with Northwestern. Kerns has been totally disabled since 2006. The issue is whether Kerns has sustained his burden of showing that his total disability resulted from an accidental bodily injury or both accident and sickness. Northwestern rejected Kerns' claim for total disability benefits after concluding that Kerns' total disability resulted from sickness, rather than an accident.

I. FINDINGS OF FACT

1. The undisputed facts section of the Pretrial Order contains the following:

1 Plaintiff J. Gary Kerns has two disability
2 income policies with Northwestern. Policy D023812
3 contains partial and total disability provisions.
4 Policy D013647 does not have a partial disability
5 benefit, only total disability. Policy D023812 pays
6 up to \$400 per month for partial or total
7 disability and the other policy pays \$800 per month
8 if plaintiff is totally disabled. The length of the
9 maximum benefit period for the policies depends
10 upon whether the disability results from accidental
11 bodily injuries (for life) or sickness (first
12 policy anniversary after age 65, or 24 months if
13 disability begins after age 63).

8 On October 3, 2006, plaintiff signed a request
9 for disability benefits, and sent it to
10 Northwestern. Plaintiff claimed as of February
11 2006, he was disabled from his occupation as an
12 insurance agent due to neck and head pain. He also
13 claimed that his disability was due to "accident"
14 from two sporting incidents in September 1987 and
15 July 2001. According to plaintiff, he sustained a
16 sprained neck and concussion when he was knocked
17 down while refereeing a college football game in
18 1987. In July 2001, plaintiff was hit on the side
19 of the head by a foul ball while a spectator at a
20 minor league baseball game.

15 The beginning date under policy D023812 (61
16 days after February 2, 2006) was April 3, 2006. The
17 maximum benefit period for sickness under this
18 policy therefore ended on August 20, 2008 (the
19 policy anniversary date following plaintiff's 65th
20 birthday). Northwestern paid all benefits under
21 these policy provisions, if disability is due to
22 sickness. The beginning date for total disability
23 under policy D013647 (181 days from February 2,
24 2007) was August 1, 2007. Per the policy, since
25 total disability under this policy began when the
26 insured was over age 63, he was entitled to a
27 maximum of 24 months of disability benefits. The
28 maximum benefit period for sickness under this
policy ended on August 1, 2009. Northwestern paid
all benefits under these provisions, if disability
is due to sickness.

24 On May 16, 2007, Northwestern Mutual wrote to
25 plaintiff and explained its claim determination
26 that the disability was the result of sickness,
27 rather than an accident.

27 (ECF Doc. 41, 1:21-2:17.)

1 2. The policies contain the following "Concurrent
2 Disabilities" provision: "If disability results from more than one
3 cause, the monthly disability benefit shall be the maximum payable for
4 any one of the causes."

5 3. Kerns is totally disabled from degenerative arthritis of
6 the spine. Kerns' expert witness Dr. Leroibarium Gardener, an
7 orthopedic surgeon, testified that Kerns experienced traumas in 1987 and
8 2001 accidents, which are "most likely" a large cause of Kerns' total
9 disability. This opinion was not expressed with the requisite level of
10 certitude required to support drawing a reasonable inference that an
11 accident was a cause of Kerns' total disability. Nor is any opinion in
12 the record opining that there is a causative connection between an
13 accident Kerns' experienced and his total disability supported by the
14 record. Expert opinions in the record which are based on assumptions of
15 fact that are without evidentiary support, or which are based on
16 conjectural factors, are insufficient to support drawing a reasonable
17 inference that an accident was a cause of Kerns' total disability.

18 4. Northwestern's expert witness Dr. Henry Alba, a
19 specialist in physical medicine and rehabilitation (also called
20 physiatry), opines it is "probable" that Kerns is totally disabled "due
21 to illness rather than [an] accident." Dr. Alba testified that "the
22 principal reason for degenerative arthritis of the spine, as well as the
23 disks, is age." Kerns was born in 1943, and was 62 years old when he
24 manifested symptoms of arthritis of the spine. Dr. Alba testified that
25 degenerative arthritis of the spine is common for a 62 year old male and
26 that Kerns' symptoms are consistent with symptoms of degenerative disk
27 disease; the literature shows approximately 95 to 97 percent of the
28 adult population will have evidence of degenerative disk disease at one

1 or multiple levels of the spine when 60 years old. Dr. Alba further
2 opined that the accidents Kerns had in 1987 and 2001 have no causative
3 connection to the unrelenting pain Kerns began experiencing in February
4 2006. Dr. Alba testified that Kerns has progressive degenerative
5 arthritis, which was asymptomatic until 2006, and this condition was not
6 accelerated by either or both the 1987 or 2001 accidents. Dr. Alba also
7 opined that Kerns' medical records do not support the contention that an
8 accident was a cause of Kerns' total disability. Dr. Alba testified that
9 Kerns' medical records do not contain ongoing complaints of neck pain
10 from either the 1987 or 2001 accident, and Kerns' CT scans and MRIs did
11 not reveal traumatic injury.

12 5. Northwestern relied on the opinion of its medical
13 consultant Dr. Alba and Kerns' medical records when it denied Kerns'
14 contention that an accident is a cause of his total disability. Dr.
15 Jonathan Beck's medical records (one of Kerns' treating physicians) are
16 included in Kerns' medical records. Dr. Beck's medical records includes
17 the following: As of August 2000, Kerns "continues to work
18 satisfactorily and enjoys [his] job;" he exercises regularly, including
19 swimming, biking and distance walking. No headaches or cervical
20 complaints were described. Further Dr. Beck's office notes in December
21 2001 Kerns suffered a post-concussive syndrome as a result of the 2001
22 baseball accident; he continued participating in swimming and biking;
23 and an x-ray and CT scan performed after the accident were normal.

24 6. On May 7, 2008, Sharon Hyde, an Assistant Director for
25 Northwestern, advised Kerns in a letter that she reviewed all of the
26 information Northwestern had, and concurred with the decision that the
27 cause of disability is sickness (degenerative arthritic changes) rather
28 than an accident (the 1987 and 2001 incidents).

1 7. Kerns was a Pac 8 or 10 football referee from 1971 -1991.
2 Kerns continued to be involved with Pac 10 Conference officiating after
3 1991 as a television network liaison. No doctor ever placed a
4 restriction or limitation on Kerns' occupational or daily activities
5 because of the 1987 and 2001 accidents.

6 8. Nothing happened suddenly or unexpectedly in 2006 to
7 cause Kerns' cervical pain.

8 **II. CONCLUSIONS OF LAW**

9 1. The burden of proof is on Kerns to establish the
10 allegations of his complaint. See White v. Aetna Life Ins. Co., 198 Cal.
11 App. 2d 370, 376 (1961).

12 2. For Kerns to receive benefits beyond the maximum time
13 allowed for sickness (i.e., for benefits for accident), he must prove
14 that an "accidental bodily injury" was a cause of his total disability.

15 3. Kerns' "accidental bodily injury" claim is unsupported
16 since, among other things, his symptoms in 2006 arose without any
17 precipitating event.

18 4. An "accident" is defined by California case authority as
19 "a casualty - something out of the usual course of events and which
20 happens suddenly and unexpectedly and without any design of the person
21 injured." Rock v. Traveler's Insurance Company, 172 Cal. 462, 465
22 (1916); Desroches v. Monumental Life Insurance Company, No. C 97-4593
23 VRW, 1998 U.S. Dist. LEXIS 12367, at *7 (N.D. Cal. 1998) (stating that,
24 as to the term "accident" within insurance policies, "courts have
25 construed the word to mean something unforeseen and unexpected;
26 something that takes place without foresight or expectation of the
27 person acted upon or affected by the event" and that "[a]n accident

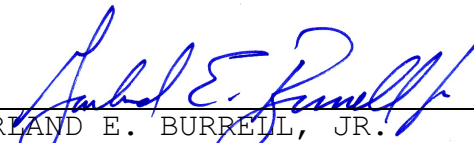
1 usually does not occur in the usual course of things but instead results
2 suddenly.”)

3 5. Kerns does not prevail on his claims since an “accident”
4 was not a cause of his total disability.

5 **III. CONCLUSION**

6 For the stated reasons, Northwestern prevails on Kerns’ breach
7 of contract and declaratory relief claims, and judgment shall be entered
8 in favor of Defendant.

9 Dated: November 30, 2010

10
11 
12 _____
GARLAND E. BURRELL, JR.
United States District Judge